

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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MAY 14 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Amendment of Section 73.202(b),)

Table of Allotments,)

FM Broadcast Stations,)

(Caldwell, College Station and)

Gause, Texas))

MM Docket No. 91-58

RM-7419

RM-7797

RM-7798

To: The Commission

REPLY COMMENTS

Bryan Broadcasting License Subsidiary, Inc. ("Bryan"), by its attorneys, hereby responds to the comments of Roy E. Henderson filed April 29, 1999 (the "Comments"), in response to the Judicial Remand of the above-referenced proceeding. The Comments of Henderson, while entertaining in style, rely more on a litany of personal attacks on Bryan than on an analysis of the legal issues involved in this proceeding. A careful review of the actual issues will demonstrate that the Commission's final decision in this case was a correct one, which should not be disturbed in this review.

A. Discussion

1. **Different City Grade Coverage Standards At the Application and Allocation Stages Are Justified**

Henderson's statement of the case deals, in great detail, with the history of the proceeding, even though such history is essentially irrelevant to the matters before the Commission. The only

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real issue is the question presented by the Commission in its remand order,^{1/} i.e. the impact of Bryan's construction permit application on the consideration of this proceeding. Contrary to Henderson's contentions, the application should have no impact on that decision.

Henderson's entire argument is based on the premise that there is no logical difference in his proposal, an allotment which cannot ever cover his city of license with a city-grade signal, and the construction permit of Bryan, which does not cover its city of license with such a signal, even though the reference coordinates of the KTSR allotment allow for a site which fully complies with all Commission rules. The difference which Henderson fails to appreciate is that his failure *at the allotment stage* to cover "4%"^{2/} of Caldwell with a city-grade signal is the best signal a station can ever provide to Caldwell when operating on the frequency which Henderson proposes. In contrast, Bryan's *allotment* proposal allows for full coverage of its city of license. While Bryan initially chose a site which did not provide such coverage, the fully spaced allotment allowed for a change in site that would provide full city grade coverage, something that Henderson's proposal could never do^{3/}. And exactly such a change has been made by Bryan in its amendment filed on

^{1/} Request for Supplemental Comments In Response to Court Remand, DA99-673 (released April 9, 1999).

^{2/} Henderson makes much of his belief that Bryan has lacked candor. However, Henderson's own claim in his comments that his initial proposal covered all but 4% of Caldwell with a city-grade signal using "the oldest and least precise method of computation (the f(50,50) rule)" is perhaps the biggest whopper told in this entire proceeding. In fact, as the Commission found in its Decision, *Henderson's proposal covers none of Caldwell using that methodology*. Memorandum Opinion & Order, FCC 98-165 (released July 22, 1998) at ¶ 9. Only by using an alternate methodology employing actual terrain measurements from a particular site (which, as shown in Bryan's comments on remand, Henderson cannot use for allotment purposes because he has never sought or received FAA approval for the site) can Henderson even make a claim of 96% coverage of Caldwell.

^{3/} Henderson speculates that Bryan had some sinister motive in not reporting in its construction permit application that city-grade coverage could not be provided from the transmitter site specified. This is absurd. As is clear from the application as originally
(continued...)

April 19, 1999, specifying a site which fully covers its city of license. Henderson fails to appreciate that, because of the allotment decision of the Commission, Bryan can make such a change to a fully spaced site. If Henderson's proposal were adopted, the Commission would create a substandard allocation with city-grade coverage which could never be 100%, and which could only get worse at the application stage.

Henderson's initial pleading makes much of arguing that Bryan's site change should not be allowed at this stage of the proceeding, and his reply pleading to be filed contemporaneously with this pleading will no doubt howl even louder about the recent Bryan application. But, again, Henderson misses the point. The Bryan application for the particular transmitter site which does not cover all of College Station with a city-grade signal is not a filing *in this proceeding*. As a permittee, Bryan has the flexibility to choose a site *in an application proceeding* which meets its needs at the moment, such flexibility including the right to file an application that proposes something less than full city-grade coverage. This is the same right that any permittee or licensee has with respect to any transmitter site selection to be submitted to the FCC on a Form 301, as long as that application does not itself propose a change in the Table of Allotments. But the Commission has always required that any change in the Table of Allotments, whether it be through a rulemaking or through a "one-step" application on a Form 301, to have a hypothetical

^{3/}

(...continued)

filed, Bryan believed that city-grade coverage would be provided. It was only later, after the application had already been filed, that Bryan became aware that the coordinates given for the tower in the application were not correct. When the engineering for the correct coordinates was completed, the city-grade coverage deficiency was revealed, and reported to the Commission. Had Bryan truly been aware of that problem and trying to hide from the Commission its intent to specify a site which did not provide city-grade coverage to College Station, as Henderson speculates, Bryan would never even have filed the construction permit application while the rulemaking was pending. Instead, Bryan sought to expedite new service to the public, over Henderson's objection, with the result being it gave Henderson one more matter about which to complain.

reference point at which the allotment will be fully spaced and will provide *all* of its city of license with a city-grade signal.^{4/} Again, this is to guard against substandard allotments which, over time, can get nothing but worse.

Leases expire, areas develop and become more valuable for commercial operations than for tower sites and are redeveloped, or populations in an area shift over time. For a myriad of reasons, existing stations are forced to change transmitter sites. The Commission has given licensees the flexibility to relocate sites, without covering 100% of their city of license, knowing that the flexibility exists without undermining the allotment priorities which led to the allotment of a particular channel because, at the allotment stage, a demonstration was made that the channel *could* cover all of its city of license with a city-grade signal. If Henderson's proposal were adopted, the Commission would not be starting out with such security. Allotments would be made at the very limits of the 80% coverage rule, without any future flexibility to change transmitter sites without seeking even a further relaxation of the 80% rule should circumstances demand.

Take, for instance, the Henderson proposal. His proposal can provide 96% coverage only by using specific terrain methodology from the particular site which he has identified. What if that site becomes unavailable? What if Henderson cannot conclude negotiations with the landowner for the use of the site? What if Henderson cannot receive FAA approval for the site?^{5/} His only

^{4/} Amendment of Commission's Rules to Permit FM Channel and Class Modifications by Application, 8 FCC Rcd 4735, 73 RR2d 247, at ¶ 13 (1993) (in one step applications, sites providing full mileage separation and city-grade coverage must be specified even if not actually used by the applicants, to insure that parties do not "receive modifications by using the one-step process that which would be denied under the two-step process."

^{5/} Henderson has never shown that his site would receive FAA approval. As stated in his Comments, at page 24, Henderson's site is over 1.2 miles away from the tower which he claims shields his proposed site. There is absolutely nothing in the record to indicate that
(continued...)

choice is to locate another site, but the Commission can have no guarantee that there will be a site that will produce anything approaching the 96% coverage he now claims. In fact, as Henderson covers little or none of Caldwell with a city-grade signal using standard predictive methodology, were the need to change sites to arise, it is obvious that any other site may well have service far below even the 80% standard. Thus, were the site to become unavailable, Henderson would be back at the Commission seeking a waiver of the 80% standard. In other words, the Commission will have made a substandard allotment, from which service to the allotment's community of license can only get worse. There will be no flexibility at all. The potential for the degradation of the FM spectrum is great, thus justifying the Commission's traditional distinction between the city-grade coverage requirements at the allotment and application stages.

The Commission has already considered exactly the arguments now being made by Henderson. In Greenwood, South Carolina, 3 FCC Rcd. 4108 (1988), the Commission was faced with a party requesting an allocation that covered less than 100% of its city of license. The Commission rejected the proposal, distinguishing it from the 80% waiver at the application stage on the grounds that allocations do not typically present specific sites which can be evaluated. As Henderson has not presented any reason for the Commission to depart from this analysis, his proposal must be rejected.

**2. Henderson Cannot Rely on New Changes to
Justify His Old Proposal**

While Henderson argues that Bryan should not be allowed to change its transmitter site to specify a site that fully covers College Station, even though a change in site is a right every licensee has, Henderson himself attempts to change his engineering theory one more time in his

^{5/} (...continued)
the FAA has no need to consider a tower which over a mile from an existing structure.

Comments. Henderson argues that a proposed downgrade of a station at Victoria, Texas will allow Henderson to change reference coordinates to ones which will allow full city-grade coverage to Caldwell. This proposal is woefully late. As with all of Henderson's alternative showings, an allotment proceeding must be evaluated on the proposal made by the cut-off date for the filing of comments in the rulemaking proceeding. Otherwise, as here, the proposal will keep changing, and never be capable of evaluation.^{6/} Henderson's own pleading, at page 18, quotes the Court of Appeals admonition that applicant's cannot "sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence." Here, Henderson's new evidence presents the Commission with exactly the problems warned about in the passage cited by Henderson, that "no judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed." Henderson cannot be allowed to offer new reference coordinates now, eight years after this proceeding began.

Here, the proposed downgrade which Henderson cites is just that -- a proposal. The proposal has not yet been granted, and the Victoria station's new facilities certainly have not been constructed and licensed. Until that facility is licensed, the Victoria station can continue to operate with its present facilities. The Victoria station could decide to never construct the new facilities at all. How long would Henderson have us sit around to wait to adjudicate his claim? This proceeding cannot wait for possible future changes which could benefit Henderson's case. It must be judged on the basis of timely made claims. To avoid endless administrative delays, the Commission's policy of evaluating all proposals on the merits advanced in the initial comments is a sound one, and should not be disturbed here.

^{6/} As demonstrated in Bryan's Comments filed on April 29, at page 5, Henderson has advanced a variety of alternative theories as this case has progressed, all of which have properly been rejected as untimely. See, Amor Family Broadcasting Group v. FCC, 68 RR 2d 573 (D.C. Cir., 1990).

Moreover, substantively, the Henderson proposal does not even provide the benefits he suggests. As set forth in the engineering statement attached hereto, Henderson ignores an upgrade proposal filed in tandem with the Victoria upgrade. If this upgrade, for a station at Comfort, Texas, is granted, Henderson's new reference coordinates specified in the engineering report accompanying his comments are shortspaced, and thus cannot be used. Thus, both procedurally and substantively, Henderson's new proposal must be rejected.

Conclusion

For the reasons set forth above, the Commission should uphold its Decision. There is a legitimate distinction between waivers of city grade coverage requirements allowed in an application, but prohibited at the allotment stage. The Commission has recognized those reasons, and should not contribute to the degradation of the FM band by changing its rules to allow for the allotment of substandard FM channels. Therefore, it must once again reject Henderson's proposal, grant that of Bryan, and terminate the proceeding.

Respectfully submitted,

**BRYAN BROADCASTING LICENSE
SUBSIDIARY, INC.**

By: 

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Dated: May 14, 1999

ENGINEERING STATEMENT IN
SUPPORT OF SUPPLEMENTAL
REPLY COMMENTS -

MM DOCKET 91-58

CHANNEL 236C2 - CALDWELL, TX

Bryan Broadcasting License Subsidiary, Inc.
College Station, TX

May 7, 1999

Prepared For: Mr. Ben Downs
Bryan Broadcasting
License Subsidiary, Inc.
P.O. Box 3248
Bryan, TX 77805

CARL E. SMITH CONSULTING ENGINEERS

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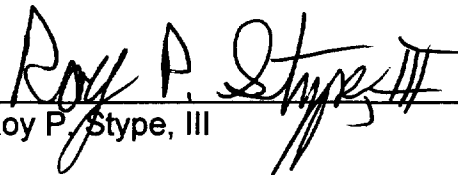
Table 1.0 - FM Allocation Study -
Channel 236C2 (95.1 MHz) -
Caldwell, TX

ENGINEERING AFFIDAVIT

State of Ohio)
) ss:
County of Summit)

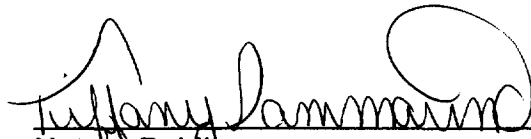
Roy P. Stype, III, being duly sworn, deposes and states that he is a graduate Electrical Engineer, a qualified and experienced Communications Consulting Engineer whose works are a matter of record with the Federal Communications Commission and that he is a member of the Firm of "Carl E. Smith Consulting Engineers" located at 2324 North Cleveland-Massillon Road in the Township of Bath, County of Summit, State of Ohio, and that the Firm has been retained by the Bryan Broadcasting License Subsidiary, Inc., to prepare the attached "Engineering Statement In Support Of Supplemental Reply Comments - MM Docket 91-58 - Channel 236C2 - Caldwell, TX."

The deponent states that the Exhibit was prepared by him or under his direction and is true of his own knowledge, except as to statements made on information and belief and as to such statements, he believes them to be true.



Roy P. Stype, III

Subscribed and sworn to before me on **May 7, 1999**.



Notary Public

TIFFANY IAMMARINO
Notary Public, State of Ohio, Cuy. Cty.
My Commission Expires Nov. 2, 2003

/SEAL/

ENGINEERING STATEMENT

This engineering statement is prepared on behalf of the Bryan Broadcasting License Subsidiary, Inc., licensee of Radio Station KTSR(FM) - College Station, Texas. It supports supplemental reply comments in MM Docket 91-58, which are being filed pursuant to the April 9, 1999 Request For Supplemental Comments In Response To Court Remand issued by the FCC in this proceeding.

This proceeding involves conflicting rulemaking proposals filed by KTSR and by Roy E. Henderson, permittee of unbuilt Radio Station KLTR - Caldwell, Texas. The Henderson proposal involves the substitution of Channel 236C2 for Channel 236A in Caldwell, Texas, and the modification of the KLTR construction permit to specify operation on Channel 236C2. The KTSR proposal involves the substitution of Channel 236C2 for Channel 297C3 in College Station, Texas, and the modification of the KTSR license to specify operation on Channel 236C2. In order to accommodate this substitution in College Station, it is also proposed to substitute Channel 297A for Channel 236A in Caldwell and modify the KLTR construction permit to specify operation on Channel 297A.

The Henderson proposal was denied in the Report and Order in this proceeding because of the fact that it is not possible to provide the required city grade coverage to 100% of Caldwell on Channel 236C2 from the proposed allotment reference coordinates or any other fully spaced site. This denial has been upheld by the FCC in denying both a Petition for Reconsideration and an Application for Review filed by Henderson in this proceeding. Upon remand from the U. S. Court of Appeals, the FCC issued the above referenced Request For Supplemental Comments requesting additional information from the parties to this proceeding.

In supplemental comments filed in response to this request, Henderson claims that there have been substantial changes in the FM Table of Allotments since this proceeding began, which, he claims, have eliminated any issues regarding the ability to provide the required city grade service to Caldwell. In particular, it is claimed that the proposed downgrade by KVIC - Victoria, Texas, from Channel 236C1 to Channel 236C3 will permit Channel 236C2 to be allotted to Caldwell at the city reference coordinates without need for any site restriction. Table 1.0 is an FM spacing study for Channel 236C2, which was conducted from the Caldwell city reference coordinates:

NL - 30° 32' 06"
WL - 96° 41' 36"

As shown in this table, operation on Channel 236C2 from this site would be short spaced to the licensed operation of KVIC on Channel 236C1, as well as both the proposed "one step" reference site and the proposed transmitter site specified in a prior filed application by KRNH - Comfort, Texas, for a "one step" upgrade from Channel 236C2 to Channel 236C1. Thus, the claim made in the Henderson comments that these city reference coordinates would be fully spaced once KVIC is downgraded to a Class C3 facility is totally false.

The Henderson supplemental comments also imply that the proposed Class C3 downgrade for KVIC is an accomplished fact. In reality, it has merely been proposed in a pending construction permit application, which has not yet even been granted by the FCC. Since the licensed Class C1 operation of KVIC must be protected until such time as a license is granted to cover the modified operating facilities, if such a license is ever granted, Henderson's claim that the mere filing of a construction permit application

by KVIC permits the filing of a proposal which fails to meet the spacing requirements to the licensed operation of KVIC is also totally without merit.

Based on the above information, the claim made in Henderson's supplemental comments that substantial changes in the FM Table of Allotments now permit Channel 236C2 to be proposed from the Caldwell city reference coordinates is totally without basis and must be discounted.

TABLE 1.0

FM ALLOCATION STUDY - CHANNEL 236C2 (95.1 MHz) - CALDWELL, TX

BRYAN BROADCASTING LICENSE SUBSIDIARY, INC.
COLLEGE STATION, TX

STUDY COORDINATES: 30/32/06 96/41/36

STATION	LOCATION	CHANNEL	CLASS	SPACING (km)	REQUIRED SPACING*	NOTES
KBCT	Waco, TX	233	A	117.05	55.0	
KLDE	Houston, TX	233	C	155.95	105.0	
KAMX	Luling, TX	234	C	108.83	105.0	1
KWRDFM	Arlington, TX	235	C	229.29	188.0	
KVIC	Victoria, TX	236	C3	195.79	177.0	7
KVIC	Victoria, TX	236	C1	195.80	224.0	11
KRNH	Comfort, TX	236	C1	213.95	224.0	6, 11
KRNH	Comfort, TX	236	C1	219.30	224.0	1, 7, 11
KRNH	Comfort, TX	236	C2	224.74	190.0	1
KYKR	Beaumont, TX	236	C1	249.87	224.0	
KYKR	Beaumont, TX	236	C	263.60	249.0	1, 7
KYKR	Beaumont, TX	236	C1	266.18	224.0	2
KYKR	Beaumont, TX	236	C	267.35	249.0	6
KNELFM	Brady, TX	237	A	263.31	106.0	
KCKR	Waco, TX	238	C	107.13	105.0	
KKMJFM	Austin, TX	238	C1	108.83	79.0	
KCKR	Waco, TX	239	C2	118.66	58.0	1, 2
KIKKFM	Houston, TX	239	C	155.95	105.0	
KHCBFM	Houston, TX	289	C	157.30	35.0	
KFMK	Round Rock, TX	290	C2	108.83	20.0	1, 2
KAJG	Centerville, TX	290	C3	112.64	17.0	2

* Required Spacing Per Section 73.207 of The FCC Rules

TABLE 1.0 (cont'd)

FM ALLOCATION STUDY - CHANNEL 236C2 (95.1 MHz) - CALDWELL, TX

BRYAN BROADCASTING LICENSE SUBSIDIARY, INC.
COLLEGE STATION, TX

Notes:

- | | |
|--------------------------------------|----------------------------------|
| 1 - Applied For Under Section 73.215 | 7 - Pending Application |
| 2 - Construction Permit | 8 - Petition For Reconsideration |
| 3 - Channel Deletion Proposed | 9 - Proposed Rulemaking |
| 4 - Move From This Channel Ordered | 10 - Rulemaking Petition |
| 5 - Move to This Channel Ordered | 11 - Short-Spaced |
| 6 - One Step Reference Site | 12 - Vacant Allotment |

CERTIFICATE OF SERVICE

I, Rhea Lytle, do hereby certify that I have this 14th day of May, 1999, mailed by first-class United States mail, postage prepaid, copies of the foregoing "**Reply Comments**" to the following:

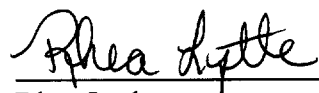
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